

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

CITY OF LOS ANGELES,

Petitioner,

v.

SUPERIOR COURT OF THE STATE  
OF CALIFORNIA FOR THE COUNTY  
OF LOS ANGELES,

Respondent;

ESTATE OF NORMA VIDES etc., et al.,

Real Parties in Interest.

B176226

(Los Angeles County  
Super. Ct. Nos. BC206780 &  
BC207495)

ORIGINAL PROCEEDING in mandate. Rodney E. Nelson, Judge.

Petition granted.

Rockard J. Delgadillo, City Attorney, and Katherine J. Hamilton, Assistant  
City Attorney, for Petitioner.

No appearance for Respondent.

Moreno, Becerra, Guerrero & Casillas, Gregory W. Moreno, Danilo J.  
Becerra, Arnoldo Casillas and Christopher F. Moreno for Real Parties in Interest.

## **INTRODUCTION**

The City of Los Angeles (City), a defendant in a wrongful death action, has challenged an order that it pay a monetary sanction of \$2000 because one its employees, also a defendant in the action, disappeared and failed to appear for a deposition. The City also challenges a terminating sanction against the employee for his failure to appear. While we reject the City's challenge of the termination sanction, we grant the petition because there was no evidence the City or its counsel was at fault for the employee's failure to appear at the deposition.

## **FACTUAL AND PROCEDURAL BACKGROUND**

Norma Vides and others were injured in an automobile accident involving a City sanitation truck. Vides was transported to a hospital via helicopter, which crashed en route, killing her. Her estate and other injured parties (referred to in this opinion as the "estate") sued the City, Robert Wayne Everton (a City employee), and others for wrongful death and negligence.

After a mistrial, and after Everton indicated to opposing counsel that he possessed undisclosed information, discovery was re-opened and counsel was given permission to retake the depositions of Everton and two others, Pulone (a City attorney) and Zuniga (an employee of the sanitation department). Despite the City's numerous attempts to contact Everton, he could not be reached and did not appear for his deposition. Pulone and Zuniga were deposed. The City told the estate's counsel before the scheduled deposition that Everton could not be reached and would not appear.

On December 22, 2003, counsel for the estate filed a motion seeking, in part, terminating sanctions against Everton and monetary sanctions against Everton and/or the City "for the time spent taking the recent depositions of [Pulone] and [Zuniga] . . . the costs related thereto, and for the time it took to prepare and present this motion."

At a January 12 motion hearing, the trial court agreed the City would send Everton a certified letter “saying that if in thirty days, unless he appears, then his answer will be stricken.” The trial court also stated that any default would be against Everton only, not the City. The City stated that terminating sanctions may be appropriate if Everton did not respond within the 30 days, so long as it was not held responsible for the default judgment.

Everton did not respond and, on February 18, the trial court granted the motion to strike Everton’s Answer. The City did not object and again requested and received assurances from the trial court that any default judgment would be against Everton only and not the City.

At a subsequent hearing the trial court initially expressed intent to “sanction Mr. Everton only” for the amount of \$3,096.40. When the City represented to the trial court that the amount the estate requested was actually for the costs incurred in taking Pulone’s and Zuniga’s depositions, as stated in the December 5 motion, the trial court retracted the monetary sanction. Later, at a final hearing, the trial court heard further argument by the parties and stated it would “sanction the City \$2,000.” When the City asked why it was being sanctioned, the trial court replied, “Well, you didn’t produce Mr. Everton.”

The City filed a petition for writ of mandate challenging the trial court’s order striking Everton’s answer and imposing the monetary sanction. We issued an order indicating our intention to grant the petition and issue a peremptory writ of mandate in the first instance with regard to the issue of the monetary sanction. (See *Palma v. U.S. Fasteners, Inc.* (1984) 36 Cal.3d 171; *Lewis v. Superior Court* (1999) 19 Cal.4th 1232; see also *Liberty Mutual Ins. Co. v. Superior Court* (1992) 10 Cal.App.4th 1282, 1290 (*Liberty Mutual*).) After receiving and considering further briefing, we now grant the petition as to the issue of the monetary sanction.

## DISCUSSION

### **1. *The City Invited Any Error Regarding Termination Sanctions.***

The City contends the trial court abused its discretion in striking Everton's answer based on his failure to appear at his deposition. We disagree.

“Under the doctrine of invited error, where a party, by his conduct, induces the commission of an error, he is estopped from asserting it as grounds for reversal.” (E.g., *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1685, citing *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 166.) Similarly, a party may waive its right to “attack error by expressly or impliedly agreeing at trial to the ruling or procedure” it later questions on appeal. (*Ibid.*)

Here, the City did not object to the terminating sanction when ordered. Rather, it was only concerned with the sanctions extending to the City. Furthermore, the City conceded when discussing the 30-day certified letter that if Everton did not respond in the allotted time, the terminating sanction would be appropriate. The City may not assert as error what it did not object to at trial and, moreover, what it invited in its discussion with the trial court.<sup>1</sup>

### **2. *The Monetary Sanction Was an Abuse of Discretion.***

The City contends, among other things, that the monetary sanction against it were improper due to both insufficient notice and a lack of fault on its part for Everton's failure to appear. While we disagree there was insufficient notice, we conclude there was no evidence to support a monetary sanction against the City.

With regard to notice, “[t]he most basic principles of due process preclude the taking of . . . property without notice of an intention to do so. [Citations.]”

---

<sup>1</sup> We further note counsel for the City does not represent Everton. Thus, the City has no standing to challenge the terminating sanction against Everton.

(*Blumenthal v. Superior Court* (1980) 103 Cal.App.3d 317, 320 [finding sanctions inappropriate in part because the moving papers contained no mention of sanctions against the petitioner].) The City had notice through the December 5 motion that sanctions were sought against all parties, including the City. While the trial court did originally signal that it would sanction Everton only, the December 5 motion was the source of the sanction controversy. And while there was some dispute as to the allocation of the estate's deposition costs, the City was on notice the estate was seeking compensation for the day Everton failed to show for his deposition.

Even with notice, however, if the evidence clearly shows the party to be blameless, monetary sanctions are an abuse of discretion. (*Weinkauff v. Superior Court* (1966) 64 Cal.2d 662, 665.) The evidence demonstrates the City was not at fault for Everton's failure to appear or for the costs incurred by estate. First, the City repeatedly attempted to contact Everton through standard and certified mail, via telephone, and by means of a private investigator. Second, the City notified the estate's counsel in advance of the deposition date that Everton could not be found and would not appear. The estate had the option of not conducting the depositions of Pulone and Zuniga and incurring the costs of doing so. Third, the estate had planned to take Pulone's and Zuniga's depositions from the time discovery was reopened. There was no evidence these depositions were completely tied to Everton's or that Everton's failure to appear was the sole cause of the incurred costs.

Accordingly, while a monetary sanction against Everton may have been appropriate, it was an abuse of discretion to impose the sanction against the City.

### **DISPOSITION**

The petition is granted. Let a peremptory writ of mandate issue, directing the trial court to: (1) vacate its order of April 30, 2004, sanctioning the City for

Everton's failure to appear at his scheduled deposition, and (2) issue a new order denying a monetary sanction or sanctioning Everton alone.

The City is to recover its costs in this writ proceeding.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

BOLAND, J.

We concur:

COOPER, P.J.

RUBIN, J.